SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FRED GABLE, CHARLIE HUTTER, Petitioners,
vs.
STATE OF ALABAMA.
No.....

SEPARATE AND SEVERAL BRIEF OF PETITIONERS
In Support of Petition for Writ of Certiorari.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals of Alabama was rendered by the Court of Appeals on June 15, 1943 (Rec. p. 108 et seq.), and appears attached hereto as Appendix A.

II.

JURISDICTION.

1. Statutory jurisdiction for this petition is founded upon the provisions of the Act of Congress of February 15, 1925, to wit, 28 U. S. C. A., Sec. 344, pages 205-206.

2. The date of the judgment of the Court of Appeals of Alabama is June 15, 1943; certiorari was denied by the

Supreme Court of Alabama October 28, 1943 (Rec. p. 124), the opinion of the Supreme Court being attached hereto as Appendix B. Rehearing was denied by the Supreme Court of Alabama on December 2, 1943 (Rec. p. 127).

3. The nature of this case and the rulings below bring the case within the jurisdictional provision of Title 28, Sec. 344, U. S. C. A., supra. Claim of right guaranteed by the Federal Constitution was presented by exception to the Court's conduct in the matter of instructing the jury during the enforced involuntary absence of the petitioner by noting an exception (Rec. p. 74) and by renewal of the exception after defendants were brought from the jail into the court room and the Court had continued instructions in their presence (Rec. p. 75). This claim of said constitutional rights and immunity is apparent on the face of the record filed in the Court of Appeals upon which the appeal of each of these petitioners was heard and the federal question being apparent on the face of the record was presented to the Court of Appeals by virtue of the statute of Alabama which requires the Court to consider all questions apparent on the record or reserved by bill of exceptions (1940 Code of Alabama, Title 15, Article 3, Section 389), which is attached hereto marked "Appendix C." It was also raised by vigorous argument on the part of counsel for petitioners in the Court of Appeals, which argument does not appear of record. The Federal right claimed separately by these petitioners is that they were denied due process of law in their trial in that

(a) the Court instructed the jury during petitioner's enforced involuntary absence and while petitioner was detained in jail under process of the Court.

III.

STATEMENT OF THE CASE.

Each petitioner was charged with robbery as defined by Title 14, Chapter 74, Section 415 of the 1940 Code of Alabama, which reads as follows:

> "Punishment of Robbery.—Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or by imprisonment in the penitentiary for not less than ten years."

An essential element of this offense is that the taking must be accompanied by violence or putting in fear which must proceed or be concomitant with the act by which the property is acquired against the will of the owner or possessor. (Vide notes to Title 14, Section 415, Code of Alabama 1940.) The defense made by petitioner was that the taking was by consent of the possessor and that the apparent display of force was a sham or pretext; that there was collusion between the alleged "victim" Eades and the petitioners, by which collusion they were to pretend that a robbery was occurring in order that the real owner of the money might be hoodwinked into believing that his trusted employee, Eades, had in fact been robbed notwithstanding the arrangement was collusive and Eades himself was to share the spoils. There was strong substantial evidence to support the contention of the petitioners and the only denial came from the lips of the alleged victim Eades. The jury very evidently had serious doubt which they evidenced by the infliction of the lowest penalty prescribed by the statute — ten years imprisonment. It is their contention that the conduct of the Court in and about instructing the jury at a time when the petitioner was involuntarily absent from the court room detained in jail by process of the Court was a denial of due process of law, and it is their contention that this denial of due process of law infringes their right guaran-

teed to them by the Fourteenth Amendment to the Constitution of the United States not to be deprived of their life, liberty or property except by due process of law, and renders the judgment a nullity.

IV.

ERRORS ASSIGNED.

1. That the courts of Alabama erred in holding that it did not constitute reversible error as being a denial of due process of law for the Court to instruct the jury during the enforced absence of petitioner while detained in jail under process of Court.

2. That the courts of Alabama deprived the petitioner of the protection of the due process of law clause of the Fourteenth Amendment by affirming a judgment rendered at a trial during which trial the defendant was compelled to be absent by process of the Court while the Court instructed the jury.

V.

ARGUMENT.

POINT I.

It is denial of due process of law for the Court to instruct the jury in a capital felony trial at a time when the defendant's presence in court is prevented by his being detained in jail by process of the selfsame court.

Lee v. State, 13 So. (2d) 583, 587;
Lee v. State, 13 So. (2d) 591;
State ex rel. Battle, 7 Ala. 135, 138;
14 American Jurisprudence, p. 899, Para. 190, and notes thereto;
Shields v. U. S., 273 U. S. 53, 71 Law. Ed. 787, 47 Supreme Court 478;
Diaz v. U. S., 223 U. S. 442, 56 Law. Ed. 500, 32 S. Ct. 250;
Article 1, Section 6, Constitution of Ala. 1901;
Wade v. State of Ala., 92 So. 101;
Kinnemer v. State, 49 Western Reports 815;
16 C. J. 813, Sec. 2066;
16 C. J. 814-15, Sec. 2067;
Cook v. State, 60 Ala. 39;
Ex Parte Bryan, 44 Ala. 402;
Wells v. State, 41 So. 630;
Harris v. State, 49 So. 458;
Bell v. State, 44 Ala. 393;
Kilgore v. State, 27 So. 4;
Andrews v. State, 34 Tenn. 540;
State v. Barnes, 59 Missouri 159;
Rolls v. State, 52 Miss. 391;
Nolan v. State, 55 Ga. 521;
21 American Reports 281;
Holton v. State, 2nd Fla. 276;
Jackson v. Commonwealth, 19 Gratt. 664;
Dutton v. State, 123 Md. 373, 91 A. 417;
Snyder v. Mass., 291 U. S. 97, 78 Law. Ed. 674, 54 S. Ct. 330, 9 A. L. R. 575;

Lewis v. U. S., 146 U. S. 370, 36 Law. Ed. 1011, 13 St. Ct. 136;
Schwab v. Berggren, 143 U. S. 442, 36 Law. Ed. 218, 12 S. Ct. 525.

In the case of Lee v. State, 13 So. (2d), at page 587, the Court of Appeals of Alabama said:

> "The almost universal rule is—and in Alabama the law has always been—that 'the right to be present during the trial of an indictment for felony cannot be waived by an accused in a capital case.'" Lee v. State, 13 So. (2d) 583, 587.

And again in the same case the Court says:

> "The record must affirmatively show prisoner's presence at each successive step in the trial." Lee v. State, supra.

The decision of the Court of Appeals of Alabama in the Lee Case, supra, was especially concurred in by the Supreme Court of Alabama in the case of Lee v. State, 13 So. (2d) 590; it is the law of Alabama supported by a long line of decisions rendered by the courts of last resort of the State of Alabama.

The Court, acting through its Sheriff and its process detaining this petitioner in jail against his will, denying to him the right to be present while the Court was proceeding to instruct the jury, was a denial to him of a trial conducted according to the **law of the land** and amounted to a denial of due process of law since the right to be present at his trial is an essential element of due process.

In the case of Wade v. State of Alabama, 92 Southern 101, the Supreme Court, speaking through Mr. Justice Anderson, said:

> "It is an elementary rule that, if possible, effect should be given to every part and every word in Constitutions, as well as statutes, unless there is some clear

reason to the contrary; and no portion of the fundamental law should be treated as superfluous. Hence as a general rule, the Court should avoid a construction which renders provisions meaningless or inoperative."

"To hold that the Court could exclude the public generally in cases is not mentioned in Section 169 of the Constitution would, in effect, emasculate said Section, and convict the framers of our present Constitution of a vain and useless act in the insertion and adoption of said Section."

"Section 6 of the Constitution of Alabama is practically taken from the Constitution of the United States."

"We do not think that the defendant had to object at the trial to the denial to him of his constitutional right, which affirmatively appears upon the records sent to the Court of Appeals if he was charged with and convicted for a felony, and it is questionable whether he could have expressly waived these rights, to say nothing of an implied waiver."

It is error for a court, in the absence of accused, at the jury's request, to re-read his instructions, though they are read actually as first given, since a defendant has a right to know that such was the case and to be present for that purpose.

Kinnemer v. State, 49 Southwestern Reporter 815.

We quote from the opinion of the above cited case as follows:

"The record shows that, after the case had been submitted to the jury and after being out several hours, the jury came into the court room, and asked to be reinstructed; whereupon the court, the defendant being in jail, and not voluntarily absent, re-read the entire instructions exactly as first given to them. The record does not show that even defendant's counsel were present when this was done. The fact that the jury asked 'to be reinstructed' shows that they

did not comprehend the charge of the court when first delivered. The re-reading of the instructions was tantamount to instructing them originally, or for the first time, because the first time the instructions were read they were not understood. There is no more important or material step in the progress of a trial than instructing the jury. Even had the record showed affirmatively the presence of defendant's counsel, still they could not waive his presence while the jury was being instructed. The instructions could not be re-read in his enforced absence, for, although they were read 'exactly as at first given,' the defendant had the right to know and see that such was the case, and to be present for that purpose." Brown v. State, 24 Ark. 620; Bearden v. State, 44 Ark. 331.

"By express constitutional or statutory provision in many states, and at common law in the absence of a statute, it is essential to a valid trial and conviction on a charge of felony that defendant shall be personally present, not only when he is arraigned, but at every subsequent stage of the trial, unless he may and does waive his right to be present." 16 C. J. 813, Sec. 2066.

"As a general rule the presence of defendant during a trial for felony must appear from the record, and generally such presence cannot be presumed; but if the record shows defendant's presence at the commencement or at any other stage of the trial, his presenec during subsequent stages thereof will be presumed, in the absence of evidence to the contrary, although this fact is not formally stated. A failure of the record thus to show the personal presence of defendant during the trial will work a reversal of the judgment of conviction. Where, however, defendant was in fact present and the record fails to show such presence, the apparent error may be corrected by amending the record."

16 C. J. 814, Sec. 2066.

"According to this rule, common law or statutory, it has been held that, unless waiver is permitted and made, defendant must be present at the arraignment

and plea; at the impaneling and swearing of the jury; at the discharge of the jury because of the sickness of a juror, or because of inability to agree; when witnesses are sworn and put under the rule; during the examination of a witness as to competency; during argument and determination as to the competency of a witness; or during the examination of witnesses or the reception of other evidence, and it has been held that this error is not cured by excluding the evidence taken in defendant's absence and by causing it to be repeated in his presence, although there are cases which hold the contrary. Defendant should also be present during the argument of counsel; when the case is finally submitted to the jury; when the court charges the jury and when they are recharged or given additional instructions after retirement; and when sentence is pronounced; but it has been held that this rule is not violated where the judge, in the absence of defendant, communicates with the jury as to matters which do not affect the interest of defendant which the jury are to consider." 16 C. J. 814-15, Sec. 2067.

There are certain inalienable rights secured by our Constitution to every defendant, and if violated the error cannot be corrected. The fact that the Court reinstructed the jury, though it may have done so in the exact language used in instructing the jury in the absence of the defendants, **is sufficient reason for the Court to set aside the verdict of the jury and the judgment of the Court in this case.** In support of this contention we cite the case of Cook v. State, 60 Ala. 39.

"It was not within the authority of prisoner's counsel to waive for him his right to be present when the verdict was returned. It seems to have been supposed that if there was error in receiving the verdict under the circumstances, it was not beyond correction; and, therefore, the persons of whom the jury was composed were reassembled about five minutes after they had been discharged; and two of them having been out of

the court room, they were sworn, and under oath declared that they had not conversed with anyone in regard to the case. But, if the jury could then be reconstituted to render a verdict which was the result of former deliberations, why should not the other ten jurors have been also examined under oath, as their companions were? They also could have communicated about the case with persons in the courthouse, during the same five minutes after they were discharged; and it was quite as necessary that they should have been purged on this subject, as that the two should be. **We think there was no virtue** in such an interrogation of any of them." Cook v. St., 60 Ala. 39.

"In a case of felony the prisoner has a right to be present in court when the jury return their verdict; which right is not waived by the failure of his counsel to object to the verdict being received in his absence, nor can it be waived by them. If the verdict is received in his absence, it is void; and the error cannot be cured, after the jury have been discharged, by immediately reassembling the jurors, examining on oath those who had left the court room, and again receiving the verdict in the presence of the prisoner."

Cook v. St., 60 Ala. 39.

It is the right of the accused to be present in all criminal prosecutions in the courts of this state, to be heard by himself and counsel, or either, and for this purpose he must be present in court, whenever any action is taken in the prosecution.

In the case of Ex Parte Bryan, 44 Ala. 402, the Supreme Court, speaking through Mr. Justice Peters, among other things, said:

"The constitution of the State is a pledge of protection to the rights it secures to every citizen. This instrument requires 'that in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either.' The import of the word 'prosecu-

tion,' in this section of the fundamental law, is to carry on or accompany a criminal suit in the courts of the State, from the beginning to the end of the procedure. Such is the legal, as well as the etymological force of the word. Then, in every step of the proceeding, which constitutes the prosecution, in which there is any action in which the accured has a right to be heard, he has the right to be present and to be heard by himself and counsel, or either. This right is without any limit, and without any exception, when the step is not one of mere discretion in the court; such as a continuance, when the accused fails to be present, and orders of a like character. This is a constitutional provision in his favor, and cannot be disregarded by the court. The court is bound by the most solemn obligation to support and defend it. The State v. Hughes, 2 Ala. 102, 104 (36 Am. Dec. 411); Henry v. The State, 33 Ala. 389; Hall v. The State, 40 Ala. 698; 1 Bish. Cr. Proc., p. 684; Const. Ala., Art. 15. Then the circuit court erred in making the order to remove the trial of the case of the State v. Bryan, to the county of Montgomery, without the presence of the accused in court, to be heard upon it, if he chose. Rev. Code, Sec. 4206, 4207; Ex Parte Chase, 43 Ala. 303; Bryan v. State, 43 Ala. 321, 323. This was such an order of the court as could not have been corrected, if wrong, by appeal, but only by mandamus. Bryan v. State.

"No doubt that a party, after making an application for a removal of the trial to another county, may abandon it, or may have it rescinded before the trial is actually removed, as he could any other interlocutory order, during the term of the court at which the same was made, before its adjournment.

"The learned judge, under the order of this court, would have acted very properly in making the order for the removal of the trial to the county of Montgomery, had the accused been in court by himself and counsel, or either, to have been heard upon the order when it was made. The error was not committed in sending the case to Montgomery county, but in making the order in the absence of the accused from the court.

"The answer of the learned judge of the circuit court to the order nisi of this court, would be sufficient if it showed that the order of this court had been complied with, or that the accused had abandoned his application for the removal of the trial, and consented to be tried in the county where the indictment was found." 44 Ala. 402.

"Where, in a prosecution for either a felony or misdemeanor, the verdict was received in the absence of the defendant and the jury were discharged, such proceeding operated as an acquittal **and could not be cured by the reconvening of the jury after accused appeared in court and after they had dispersed, but after the verdict was read.**"

Wells v. State, 41 So. 630;
Harris v. State, 49 So. 458;
Bell v. State, 44 Ala. 393;
Kilgore v. State, 27 So. 4.

"It is not only the right of a prisoner to be present in every stage of criminal prosecution against him for a felony, but the general rule is that his presence is indispensably necessary in such cases, particularly in capital ones, during the whole trial and until final judgment."

Andrews v. State, 34 Tenn. 540;
State v. Barnes, 59 Mo. 139;
Rolls v. State, 52 Miss. 391.

"The prisoner's presence is required during the impaneling of the jury, the taking of testimony, the rendition of the verdict, and the prisoner's right to be present at every stage of his trial for a felony is one **which cannot be denied him.**"

Nolan v. State, 55 Ga. 521;
21 Am. Rep. 281.

"To deprive defendant of his inalienable right and to convict him by pursuing any other cause, is to dispose of his case in a manner not authorized 'by due course of law.'"

Holton v. State, 2 Fla. 276.

"The better opinion is that in a trial for a felony the defendant cannot waive his right to be present during all the proceedings."

Jackson v. Commonwealth, 19 Gratt. 664.

POINT II.

The right to be present at every stage of the trial is a right which cannot be waived by counsel for defendant in a capital case.

Lee v. State, supra;
Lee v. State, supra;
And other authorities cited in support of Point I.

The Court of Appeals of Alabama in its decision recognized the right of this petitioner to be present while the Court was proceeding to instruct the jury, but sought to avoid the effect of that absence by holding that counsel for defendant waived by acquiescence the right of defendant to be present while the Court was instructing the jury, in the following language:

"Manifestly, when the court and jury were first consulting, defendant's counsel were aware of the absence of defendants from the court room, though the trial court was not. It was, therefore, incumbent upon counsel to have the court informed as to this, and not sit quietly by and then reserve an exception to the court's constitutional action. There is no merit in the exception reserved under the facts and circumstances hereinabove detailed."—Opinion Court of Appeals, Appendix A.

The Court of Appeals cites as authority for this holding the case of Ferguson v. State, 137 So. 315, which citation is inapt. The defendant in the Ferguson Case, before entering upon his trial, made a motion to quash the venire, etc., but was not present while the Court was considering

the motion to quash the venire; the Court overruled the motion to quash the venire in the absence of the defendant Ferguson, but discovering defendant's absence, being under the impression that defendant should be present, he announced that he was

"going to do it all over."

The motion to quash was not a part of the trial. It was a preliminary proceeding **before trial began.** This distinction was definitely drawn by the Court of Appeals in its opinion. The Court of Appeals based its affirmance of the judgment of the trial court below upon its finding as follows:

> "It affirmatively appears that the defendant was present at every stage of the trial."—Ferguson v. State, supra.

And specifically held that the motion to quash constituted "preliminaries" to the trial.

The attempt of the Court of Appeals to establish a waiver on part of counsel for defendant ignores the law of Alabama as declared in the Lee Case, supra, wherein it is positively held that counsel cannot waive the right of a defendant in a capital case to be present at every stage of the trial.

The finding of fact on the part of the Court of Appeals, upon which it bases its decision that counsel waived petitioner's right to be present while the Court was instructing the jury, has not a scintilla of foundation in the record. For aught that appears in the record counsel for defendant had but appeared at the moment when he interposed his exception to the conduct of the Court in instructing the jury while defendant was absent in a capital case. These proceedings occurred twenty-four hours after the jury had retired and while the court had been in continuous recess

so far as this case was concerned. There is not a word in the record to show that counsel for defendant had arrived at this recess session of court one instant before the moment when he interposed his objection to proceeding in the absence of defendants.

Neither is there a word in the record from which the Court of Appeals is authorized to find that the trial court was not aware of the absence of defendants while he was proceeding to instruct the jury. It was the solemn and sacred duty of the Court to ascertain the presence of defendants before proceeding with the trial. The presumption would be that the court below either failed to perform its solemn duty to ascertain that defendants had been brought from the jail to the court room before proceeding with his instructions to the jury, or that the Court erroneously and in denial of due process of law to petitioner proceeded without regard to their presence.

POINT III.

The violation of a substantial constitutional right is conclusively presumed to be injurious in a trial for a capital felony.

Lee v. State, and other cases cited supra in support of Point I.

It will be observed that in the Lee Case, supra, the Court of Appeals held that, notwithstanding their reluctance to be compelled to reversal by the violation of the constitutional right of the defendant in a capital felony to be present at the time of the rendition of the verdict, the mere fact of such violation compelled a reversal. This opinion, in so far as it related to a capital felony, was emphatically concurred in by the Supreme Court in Lee v. State, 13 So. (2d) 590. Many other cases are to the same effect. The error cannot be dismissed upon the ground that it is error without injury since it is a matter of such

high public concern that the constitutional safeguards surrounding a trial of a citizen upon a capital charge be observed to the strict line.

> "The argument, however, extends beyond those statutes and cites the broad public interest in life or liberty of a person and his welfare which the state entertains." Lee v. State, 13 So. (2d) 590, 593.

Nor can the error be cured by sending to the jail and getting the defendants and bringing them into open court and there again rehearsing what has gone on in their absence. A defendant upon trial for a capital felony has an absolute right to be present at every stage of the proceedings from the beginning to the end of his trial—from the time issue is joined upon plea of not guilty until the verdict of the jury is rendered and sentence pronounced. This right is guaranteed to him by the Constitution in order that he may by the evidence of his own five senses have **knowledge** of the proceedings and opportunity to discuss questions of law and fact which may arise as distinguished from merely **being informed** as to what proceedings have occurred with regard to certain phases of his trial. The high quality of the verification given to the information furnished to him as to what proceedings have been taken in his absence **cannot be the equivalent of knowledge.** The rehearsing of the proceedings taken in his absence amounts, so far as he is concerned, to no more than **mere information**, which is not the equivalent of **knowledge.** Once this constitutional safeguard is broken down, it is but an easy step to the old star chamber trials employed by tyranny as its instrument of oppression. This right to be present at every stage of the trial is so sacred that it has been a part of every Constitution of the United States and of the State of Alabama. This right to be present at every stage of the proceeding is so sacred that a judgment of conviction is a nullity in Alabama

which does not so recite. This was recognized by the State of Alabama in the instant case. The original record filed in the Court of Appeals contains the original judgment entry at page 99 of the record. This original judgment entry does not recite that the defendants were present throughout the trial. Certiorari to the court below was granted upon motion of the State (Rec. pp. 104-105), and in response to that writ of certiorari the Clerk of the Circuit Court sent up what purports to be this judgment entry, which apparently was not in the record on the 30th day of October, 1942, when the Clerk of the Circuit Court of Baldwin County certified the original record (Rec. p. 103). This judgment entry (Rec. pp. 105-106), certified by the Clerk of the Circuit Court of Baldwin County under date of April 19, 1943 (Rec. p. 107), does recite that the defendants

> "All being present in open court at each and every stage, and during all the proceedings in this cause" (Rec. pp. 105-106).

The insertion of this clause in the judgment is essential to its validity. Without this clause being in the judgment habeas corpus would lie upon the ground that the judgment was a nullity. Yet the record itself shows that this recital in the judgment is untrue. The record of the trial shows without dispute by the very admission of the Court itself that these defendants were in jail and absent from the court room while the Court was proceeding to instruct the jury (Rec. p. 74). The judgment is thus falsified by the very record which must support the judgment if the judgment is to be supported. It is respectfully urged upon the Supreme Court of the U. S. that a trial conducted in denial of due process of law, and particularly where that due process of law is denied in a capital case, and constitutes a denial of a right guaranteed by both the federal and state constitutions, injury must be conclusively presumed.

CONCLUSION.

It is respectfully submitted to the Supreme Court of the United States that these petitioners are entitled as of right to have the judgment rendered in the trial court against them vacated and set aside for and on account of the fact that said judgment is a product of a trial conducted in violation of the guarantee contained in the Fourteenth Amendment to the Federal Constitution that no citizen shall be denied life, liberty or property without due process of law.

So confident is each petitioner that his innocence will be declared by a jury when tried again that he earnestly seeks the opportunity of submitting his case again to a jury notwithstanding the fact that in so doing he stakes his life upon the sound discretion of the next jury which shall try his case.

Respectfully submitted,

G. ERNEST JONES,
Counsel for Petitioners.

RODERICK BEDDOW,
Of Counsel for Petitioners.